OAH 65-1005-30057

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF COMMERCE

In the Matter of Equity Builders, *et al.*

ORDER ON A MOTION FOR DEFAULT JUDGMENT

This matter came before Administrative Law Judge Eric L. Lipman for a Pre-Hearing Conference on December 5, 2012, at 9:30 a.m.

Michael J. Tostengard, Assistant Attorney General, Minnesota Attorney General's Office, appeared on behalf of the Minnesota Department of Commerce (Department). There was no appearance on behalf of the following parties: David Richard Lies; Home Rescue Financial Services, LLC; David M. Green, Esq., c/o The Green Law Group, PLLC; Law Office of David M. Green d/b/a The Green Law Group, PLLC; Law Office of David M. Green d/b/a The Green Law Group, PLLC, W. Hempstead, New York; Kim Gerette Martorana, Esq.; Martorana Legal Services, LLC, Chesterland, Ohio; Martorana Legal Services, LLC, Auburn Twp, Ohio; Debtcare USA; and Zuma Debt Solutions a/k/a Zuma Legal Services of America (collectively referred to as Defaulting Respondents).

On December 11, 2012, the Department served Notice of Motion and Motion for Default, pursuant to Minn. R. 1400.6000. Respondents were served with a copy by U.S. mail on December 11, 2012, Defaulting Respondents' last known addresses. The hearing record closed on January 2, 2013, ten (10) working days after receipt of the Department's Notice of Motion and Motion.

STATEMENT OF THE ISSUES

1. Whether Respondents engaged in mortgage origination or modification activities without a license in violation of Minn. Stat. § 58.04?

2. Whether Respondents failed to obtain a surety bond prior to conducting mortgage modification services in violation of Minn. Stat. § 58.08?

3. Whether Respondents failed to maintain a trust account on behalf of mortgage modification customers in violation of Minn. Stat. § 58.16?

4. Whether Respondents engaged in fraudulent, deceptive, and dishonest practices in violation of Minn. Stat. § 58.12, subd. 1(b)(2)(iv)?

5. Whether Respondents made false and misleading misrepresentations in violation of Minn. Stat. § 58.13, subd. 1(9)?

6. Whether Respondents have demonstrated untrustworthiness and financial irresponsibility in violation of Minn. Stat. § 58.12, subd. 1(b)(2)(v)?

7. Whether Respondents failed to respond to the Department's investigation in violation of Minn. Stat. § 58.12, subd. 1(b)(2)(ix)?

8. Whether Respondent Martorana has been found by a court to have committed fraud in violation of Minn. Stat. § 58.12, subd. 1(b)(2)(viii)?

9. Whether Respondents took advance compensation for mortgage foreclosure consulting services in violation of Minn. Stat. § 325N.04(1)?

10. Whether Respondents placed liens on credit counseling customers in violation of Minn. Stat. § 325N.04(3)?

11. Whether Respondents accepted powers of attorney for credit counseling customers in violation of Minn. Stat. § 325N.04(6)?

12. Whether Respondents engaged in unregistered credit services organization activities in violation of Minn. Stat. § 332.54?

13. Whether Respondents failed to obtain a bond for credit services organization activities in violation of Minn. Stat. § 332.55?

Based upon all of the filings by the parties, and for the reasons set out in the Memorandum below,

IT IS HEREBY ORDERED THAT:

1. The Department's Motion for a Default is **DENIED WITHOUT PREJUDICE** to re-filing.

2. The reassignment of this matter for additional proceedings to the Honorable Ann C. O'Reilly is still in effect and the current docket number is listed above.

Dated: April 18, 2013

s/Eric L. Lipman
ERIC L. LIPMAN
Administrative Law Judge

MEMORANDUM

On October 19, 2012, a Notice of and Order for Hearing and Order for Prehearing Conference (Notice of Hearing) was served upon Respondents by first class mail at the addresses for Respondents on file and of record with the Minnesota Department of Commerce.[1]

The Notice of Hearing advised Respondents that a Prehearing Conference was scheduled for December 5, 2012, at 2:30 p.m., at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota.[2]

The Notice and Order for Hearing requires that any party intending to "appear at the prehearing conference must file a Notice of Appearance form and return it to the Administrative Law Judge within 20 days of the date of service" of the Notice and Order for Hearing.[3]

The Notice of Hearing specifically provided:

> Respondents' failure to appear at the prehearing conference or hearing may result in a finding that Respondents are in default, that the Department's allegations contained in the Statement of Charges may be accepted as true, and that its proposed disciplinary action may be upheld.
>
> If any party has good cause for requesting a delay of the prehearing conference, the request must be made in writing to the Administrative Law Judge at least five days before the prehearing conference. A copy of the request must be served on the other party.[4]

No Notices of Appearance were filed with the Office of Administrative Hearings by Respondents.

A Prehearing Conference was held on December 5, 2012, before Administrative Law Judge Eric L. Lipman.

There was no appearance by Respondents at the Prehearing Conference on December 5, 2012. Respondents did not contact the ALJ, the Office of the Attorney General, or the Department to seek a continuance of the Prehearing Conference or request other relief.

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[1] *See*, Affidavit of Peggy Curtis (October 19, 2012).

[2] Notice of and Order for Hearing and Order for Prehearing Conference, at 2.

[3] *Id.* at 11.

[4] *Id*.

Respondents' failure to appear was without consent of the Administrative Law Judge.

The Notice and Order for Hearing alleges, in part:

> 3. In June 2009, Save My Home USA and MSM ceased working together and Steffens terminated his relationship with Miller and Mignone, who then formed M&M. Offices were moved to a new address in Eden Prairie. M&M continued to offer mortgage loan modification services in connection with Respondents Green, LODG and Zuma between June 2009 and June 2010….
>
> 4. M&M also made representations to potential customers that it had a 90% success rate, which was false. M&M also made a false representation that customers would get a 100% money back guarantee. The documentation provided by Green, however, did not provide for a money back guarantee. In addition, M&M falsely referred to itself as the corporate office of Green's law practice and provided customers opinion letters from Green stating that Green represented the client and giving an opinion as to the likelihood of success in modifying the client's note and mortgage. The initial fee offered was for $1,150 and the total fee was $3,150. If the client chose to pay for more legal services, an additional $2,000 was billed.[5]

Pursuant to Minn. R. 1400.6000, a contested case may be decided adversely to a party who defaults. Upon default, the allegations and claims set forth in the Notice and Order for Hearing may be taken as true or deemed proved without further evidence.

The default rule, however, is permissive – drafted so as to account for circumstances like the case at bar.

As noted above, the Notice and Order for Hearing blends factual allegations against the parties who failed to appear (such as Green, his law office and Zuma Debt Solutions) with the claims of those who made appearances to contest the claims, like M&M. The tribunal is unwilling to deem certain claims in the complaint true for purposes of liability of some, while disputed and unproven for those who have joined the litigation. For sound hearing management this is an untenable proposition.

As the U.S. District Court for the District of Minnesota has noted:

> Where multiple parties are co-defendants but less than all are in default, courts should refrain from issuing a default judgment that would create an "absurdity." The [rule of *Frow v. De La Vega*, 82 U.S. 552, 554 (1872)] is typically limited to situations where the co-defendants are jointly and severally liable. However, some courts have declined to issue a default

[5] *Id.* at 6-7.

where the liability of a non-defaulting party necessarily depends on the liability of the defaulting party.[6]

The federal courts likewise instruct that if separate independent grounds for liability against a co-defendant exits, this may support a judgment on the merits. In this instance, therefore, whereas entry of a default judgment on the claims in the Notice and Order for Hearing may be inappropriate, a future motion for Summary Disposition as to the defaulters or a renewed Motion for Judgment may be appropriate.[7]

For these reasons, the Department's Motion for a Default Judgment is denied without prejudice to re-filing.

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[6] *Reshare Commerce LLC v. Close to My Heart, Inc.,* 2010 W.L. 5330871 at *1 (D. Minn. 2010) (citing *McMillian/McMillian, Inc. v. Monticello Ins. Co.*, 116 F.3d 319, 321 (8th Cir.1997) and *Diarama Trading Co. v. J. Walter Thompson U.S.A., Inc.,* 2002 W.L. 31545845 at *4 (S.D.N.Y. 2002) (refusing to enter default judgment where rights in trademark of appearing parties derived from rights of a defaulting defendant)); *see also, Pfanenstiel Architects, Inc. v. Chouteau Petroleum Co.*, 978 F.2d 430, 433 (8th Cir. 1992) ("When there are multiple defendants who may be jointly and severally liable for damages alleged by plaintiff, and some but less than all of those defendants default, the better practice is for the district court to stay its determination of damages against the defaulters until plaintiff's claim against the nondefaulters is resolved. This is not because the nondefaulters would be bound by the damage determination against the defaulters, but to avoid the problems of dealing with inconsistent damage determinations against jointly and severally liable defendants").

[7] *See generally, Angelo Iafrate Const., LLC v. Potashnick Const., Inc.*, 370 F.3d 715, 722 (8th Cir. 2004) ("When co-defendants are similarly situated, inconsistent judgments will result if one defendant defends and prevails on the merits and the other suffers a default judgment. To avoid such inconsistent results, a judgment on the merits for the answering party should accrue to the benefit of the defaulting party.… Parties are not similarly situated and a default judgment does not establish inconsistent judgments, however, if the liability of the defaulting party is based on independent wrongful acts or a legal theory distinct from the one under which the answering party prevailed.").